

Before the  
**UNITED STATES COPYRIGHT ROYALTY JUDGES**  
**LIBRARY OF CONGRESS**  
**Washington, D.C.**

**In the Matter of:**  
**Determination of Royalty Rates and Terms**  
**for Making and Distributing Phonorecords**  
*(Phonorecords IV)*

**Docket No. 21–CRB–0001–PR**  
**(2023–2027)**

**ORDER ON SERVICES’ MOTION TO COMPEL COPYRIGHT OWNERS TO  
PRODUCE FIVE CATEGORIES OF DOCUMENTS (eCRB No. 26695)**

On May 24, 2022, Amazon.com Services LLC, Spotify USA, Inc., Apple Inc., and Pandora Media, LLC (“Services”), filed a motion requesting that the Copyright Royalty Judges (“Judges”) compel Copyright Owners to produce documents in response to certain requests (eCRB No. 26695) (Motion).<sup>1</sup> Copyright Owners filed an Opposition on June 8, 2022. The Services filed a Reply on June 15, 2022.

The Motion identifies documents and information from five categories: (1) documents analyzing sound recording royalty rates; (2) publisher licensing documents; (3) market share information; (4) documents related to unpaid royalties delivered to the Mechanical Licensing Collective (“MLC”); and (5) documents related to songwriter fees, audits, and advances. Motion at 1. The Services believe that the documents they request directly relate to Copyright Owners’ Written Rebuttal Statement (“WRS”). *Id.* They ask the Judges to reject Copyright Owners’ attempt to limit their discovery responses based on the publishers from which they chose to submit testimony on a given topic, which, according to the Services, the Judges have already held to be an improper limitation. *Id.* The Motion requests that the Judges compel Copyright Owners to produce documents and information relating to the following requests and interrogatories: Requests 119, 95, 109, 118, 11, 56, 63, 67, 69, 79, 86, and 87 and Interrogatories 14, and 17-20.

**Request 119 and Interrogatory 14**

According to the Services, Request 119 seeks documents concerning the impact of sound recording royalty rates on the development of the interactive streaming market, the mechanical royalties that music publishers are able to negotiate in that market, the profitability of music publishers, the income of songwriters, and the profitability of interactive streaming services. Motion at 3. The Services contend that these documents relate directly to Dr. Jeffrey Eisenach’s written rebuttal testimony. *Id.*, citing Eisenach WRT ¶¶ 189-214, 69 & n.110.

<sup>1</sup> Amazon and Spotify join the Motion in full. Pandora joins as to Interrogatories 17-20, whereas Apple joins to the extent the requests in the Motion overlap with those Apple served on Copyright Owners. Motion at 1 n.1 (referencing Apple Requests 11, 27, 31, 35, 41, 37, 51, 52, and 53, and Interrogatories 14 and 17-20).

Interrogatory 14 asks Copyright Owners to identify the terms of operative contracts between publishers or songwriters on the one hand and record labels or recording artists on the other, in which publishers or songwriters agree to share musical-works royalties with record labels or recording artists (or vice versa for sound-recording royalties). *Id.* at 4. The Services contend that this interrogatory seeks information related to a particular insight in Professor Douglas Lichtman’s rebuttal testimony, *i.e.*, if existing musical-works royalty rates were too low, labels and artists would likely remedy the shortfall by paying songwriters to create more songs. *Id.*, citing Lichtman WRT ¶¶ 45-52 (and Marx AWDT ¶ 147). The Services contend that both the presence (and magnitude) or absence of such payments would be relevant in proving or disproving Copyright Owners’ narrative about the compulsory license under-incentivizing songwriting. The Services also reference Professor Lichtman’s explanation about how the ability of publishers and labels to re-allocate royalties among themselves is relevant to and undermines Copyright Owners’ Shapley analysis. *Id.* The Services also believe that this information is relevant to Amazon witness Wayne Coleman’s testimony regarding the practice of songwriters sharing songwriting credit with recording artists to induce the artist to record a song. *Id.* at 4-5, citing Coleman WDT ¶ 39 and Lichtman WRT ¶ 47 n.54. The Services believe this practice “bears directly on the market allocation of royalties among musical-works rights holders and sound-recording rights holders, which is at the core of both the Copyright Owners’ and Amazon’s benchmarking approach.” *Id.* at 5.

Copyright Owners contend that Request 119 is incomprehensible and unrelated to anything in their WRS. Opposition at 10. Copyright Owners accuse the Services of mischaracterizing Dr. Eisenach’s testimony. They contend that he was simply rebutting certain Services’ claims (*i.e.*, that so-called “must have” catalogues generate disproportionate bargaining power, that royalty rates are above effectively competitive levels, that the Services supposedly suffer economic loss, and that Copyright Owners exercise leverage due to most favored nation clauses). *Id.* at 11, citing Eisenach WRT ¶ 189. Copyright Owners assert that the Services already have Dr. Eisenach’s work papers supporting his critiques and they should not be entitled to more. *Id.*

As to Interrogatory 14, Copyright Owners assert that publishers do not routinely maintain agreements between songwriters and record companies but note that searching for such agreements would require looking at thousands of songwriter agreements over a five-year period, which would be burdensome. Opposition at 13. Copyright Owners also contend that the Services’ arguments in support of responding to Interrogatory 14 (*i.e.*, that the presence or absence of such agreements is relevant) is a “heads I win, tails you lose” argument. Copyright Owners take the opposite side of the coin, as it were, arguing that neither of the Services’ arguments justifies the interrogatory.

## **Ruling**

Request 119 seeks:

All Documents concerning the Sound Recording Royalties charged by Record Companies to Interactive Streaming Services, including but not limited to all Documents concerning the impact of those rates (i) on the development of the interactive streaming market; (ii) on the Mechanical Royalties that Music Publishers are able to negotiate in the interactive streaming market; (iii) on the profitability of Music Publishers or the incomes of Songwriters; and (iii) on the profitability of Interactive Streaming Services. Eisenach WRT § VI.

While some of the requested documents might directly relate to some aspects of Dr. Eisenach's WRT, it is impossible to identify which do and which do not. Therefore, the request is **DENIED** as vague and overbroad.

With respect to Interrogatory 14, Copyright Owners do not dispute its relevance, but argue instead that publishers do not routinely maintain such agreements, the request is burdensome, and the Services' contend that they would be advantaged whether or not such agreements exist. Because the Judges find Interrogatory 14 relevant to the matters addressed in this proceeding, they **GRANT** it but only with respect to the six publishers identified in the discussion of Requests 79, 86, and 87 below (*i.e.*, Sony, UMPG, Warner Chappell, peermusic, Kobalt, and BMG). The Judges believe that this limitation balances the Services' request for relevant information against Copyright Owners' legitimate concern about the potentially burdensome nature of the original request. Copyright Owners shall conduct a good-faith search of any responsive documents and produce them no later than ten days after the date of this order, or, as applicable, state affirmatively that Copyright Owners' search yielded no responsive documents.

### **Requests 95, 109, and 118**

According to the Services, these requests seek documents related to the impact of alleged information asymmetries on licensing negotiations, music publishers' willingness to accept discounts and deductions from revenue in the context of voluntary agreements, and the use of performance licenses or royalties as leverage in negotiations over mechanical licenses and royalties. Motion at 5. The Services contend that several Copyright Owner rebuttal witnesses discuss these topics. *Id.* at 5-6, citing Brodsky WRT ¶¶ 4, 7, 17, & 78; Kokakis WRT ¶¶ 24, 45; Eisenach WRT ¶¶ 108-111.

Copyright Owners call Request 95 wildly overbroad and burdensome and contend that the request requires Copyright Owners to search for information they lack as opposed to what they have. Opposition at 8. Copyright Owners contend that it is undisputable that there is informational asymmetry and the Services exploit it and [REDACTED]

*Id.*

With respect to Request 109, Copyright Owners contend that the rebuttal testimony that the Services reference in support of this request--that of Mr. Kokakis--only addressed specific discounts in particular agreements rather than all conceivable tradeoffs that might exist in all agreements by everyone. Copyright Owners contend that, at most, what is directly related to this

testimony are the specific agreements Mr. Kokakis referenced, and the Services already have the deductions he referred to, which, from Copyright Owners' perspective, is the best evidence of what they are. Copyright Owners believe that the Services have the communications on these agreements and know what the tradeoffs were. Opposition at 9.

Copyright Owners contend that Request 118 is not remotely related to anything in Copyright Owner's WRS. *Id.* According to Copyright Owners, neither Mr. Brodsky's nor Dr. Eisenach's WRT says anything about performance licenses or performance royalties—the subject of Request 118. *Id.* Copyright Owners also contend that Request 118 substantially duplicates Apple Request 54, which concerns the downward pressure created by the compulsory license on mechanical and performance royalties. Copyright Owners contend that the Copyright Office and Amazon's former expert, Dr. Hubbard, already acknowledged the downward pressure of the compulsory license. *Id.* at 10.

### **Ruling**

The Judges find that Request 95 is directly related to Copyright Owners' WRS and therefore is **GRANTED**. Copyright Owners shall produce all responsive documents relating to information asymmetry as referenced in the WRT of Eisenach (¶¶ 109-111), Brodsky (¶¶ 4, 7, 17), and Kokakis (¶ 45) or state affirmatively that Copyright Owners have conducted a good-faith search and found no responsive documents.

Request 109 is **GRANTED** with respect to agreements or other documents that Mr. Kokakis reviewed relating to his statement in his WRT at ¶¶ 23-24 regarding deductions from revenue that publishers are willing to accept in direct licenses, including any such documents or agreements that might contradict such testimony.

Request 118 (use of performance licenses or royalties as leverage in negotiations over a mechanical license) is, at best, tangentially related to Mr. Brodsky's and Dr. Eisenach's WRT regarding the shadow of the compulsory license. Therefore, the request is **DENIED**.

### **Interrogatories 17-20**

According to the Services, Interrogatory 17 seeks the stream share for each NMPA board member on each interactive streaming service by geographic market. Interrogatories 18-20 ask Copyright Owners to state whether they contend that an interactive streaming service could forgo a license from a licensor with a sufficient stream share. Motion at 6-7. The Services contend that these interrogatories are all relevant to publisher market power, which, the Services believe, is an issue of central relevance in this proceeding. *Id.* at 7.

Copyright Owners believe that the Services are in a better position to provide the information sought in Interrogatory 17. Opposition at 14. With respect to Interrogatories 18-20, Copyright Owners contend that each posits a hypothetical that is far too vague to allow Copyright Owners to formulate a response. *Id.* at 15.

## Ruling

The Services' request to compel Copyright Owners to produce information responsive to Interrogatory 17 is **GRANTED**. If a publisher or publishers do not have any responsive information, Copyright Owners shall state affirmatively that such entity has no responsive information.

With respect to Interrogatories 18-20, the Judges do not agree with Copyright Owners' contention that they are so vague as to prevent them from answering. They seek yes/no answers with respect to Copyright Owner contentions. The Judges **GRANT** the Services' request to compel the Copyright Owners to provide substantive responses. Copyright Owners shall respond to each such interrogatory and may, if applicable, clarify or condition their responses if they believe it is necessary to ensure that their responses are complete and accurate.

## Request 11

According to the Services, this request seeks documents concerning the unpaid royalties that the Services purportedly delivered to the MLC in February 2021. Motion at 7. The Services contend that several of Copyright Owners' witnesses testified about these royalties and blamed the Services for unmatched funds. *Id.*, citing Aguirre WRT ¶¶ 20-24, Beekman WRT ¶¶ 56, 60, and Kelly WRT ¶¶ 69, 73. The Services assert that Request 11 relates directly to this testimony.

Copyright Owners contend that there was no discussion of any studies or analyses with respect to this issue. Opposition at 2. Copyright Owners represent that their witnesses relied on undisputed public information issued by the MLC, and argue that the Services know what they paid and withheld. *Id.* at 1-2. Copyright Owners contend that Request 11 has no pertinence to anything in Copyright Owners' WRT. *Id.* at 2.

## Ruling

Request 11 is **GRANTED** because it is directly related to the WRT that the Service cite. Copyright Owners must produce any responsive documents or state affirmatively that, after conducting a good-faith search, they found no responsive documents.

## Requests 56, 63, 67, and 69

According to the Services these requests seek documents that relate to Copyright Owners' WRT about songwriters. Motion at 8. The Services cite the following WRT paragraphs in support of their requests:

Request 56 (agreements requiring songwriters to reimburse expenses paid by music publishers in any *Phonorecords* proceeding): Beekman WRT ¶ 16; Kelly WRT ¶ 22;

Request 63 (documents sufficient to identify all audits that resulted in music publishers paying songwriters inappropriately withheld royalties and the amounts paid to songwriters as a result of such audits): Beekman WRT ¶ 21; Kelly WRT ¶¶ 29-31;

Requests 67 and 69 (documents demonstrating the [REDACTED] and the proportion of currently operative agreements between music publishers and songwriters containing administration and equivalency fees): Beekman WRT ¶¶ 41, 44. Motion at 9-10.

Amazon and Spotify state that they agree with the Judges that the issue of songwriter shares of publisher royalty income and publish-songwriter contracts appears irrelevant in this proceeding, but since the Copyright Owners rejected the Judges’ invitation to withdraw that testimony and appear to be doubling down on their songwriter-related arguments, Copyright Owners must produce the documents that they have put in issue and made a part of their case. *Id.* at 8 n.4, citing, e.g., *Order Granting in Part Google’s Motion to Compel Documents and Information From Copyright Owners* at 5 (Apr. 28, 2022).

Copyright Owners charge that these requests appear to be a fishing expedition designed to find something to support the testimony of Wayne Coleman. Opposition at 3. In reference to Request 56, Copyright Owners contend that they cannot produce what does not exist. *Id.* In reference to Request 63, Copyright Owners acknowledge that there are audits and they are part of the normal course of business, but, they contend, Copyright Owners’ rebuttal testimony did not address a single audit. *Id.* at 4. Copyright Owners contend that conducting the search regarding audits that Request 63 entails would be overly burdensome. *Id.*<sup>2</sup> In reference to Request 67, Copyright Owners contend that it does not seek information germane to this proceeding, and the Services already have the information they need to do the analysis. Opposition at 5. In reference to Request 69, Copyright Owners contend that the request addresses an unsupported assertion of Mr. Coleman and the Services misstate Mr. Beekman’s testimony to justify the request. Copyright Owners acknowledge that Mr. Beekman addressed the issue regarding administration or equivalency fees in his rebuttal testimony, but contend that he merely said that they were more common in old legacy contracts rather than that they were only present in such contracts from the 1960s and earlier. *Id.* at 6.

### **Ruling**

Requests 56, 63, 67 and 69 are directly related to Copyright Owners’ written rebuttal testimony. The Services’ request to compel production with respect to these requests is therefore **GRANTED**. Copyright Owners shall produce all responsive documents or state affirmatively that they have conducted a good-faith search and found no responsive documents. To the extent that Copyright Owners are uncertain about how to interpret the term “inappropriately” in Request 63 they shall meet and confer with the Services’ counsel and such counsel shall promptly provide such clarification.

---

<sup>2</sup> Copyright Owners take exception to the undefined term “inappropriately” in Request 63 with respect to withheld royalties. Opposition at 4 n.2. The Opposition is silent on whether Copyright Owners raised this concern with the Services during the meet-and-confer process.



### Requests 79, 86, and 87

According to the Services, Copyright Owners have agreed to conduct searches with respect to these requests, which relate to Amazon's Prime Music service, but only of the files of a single publisher (Sony Music Publishing) because the requests address topics that that publisher put at issue, although the Services contend that multiple publishers may have documents responsive to these requests. Motion at 10 -12 and Masterman Decl. at 39-40. The Services contend that the Judges have already rejected that limitation in this proceeding. Motion at 10, citing *Order Granting In Part and Denying In Part Services' Motion to Compel Production of Documents* (May 2, 2022) at 4 ("Even though only one UMPG witness testified regarding the value of catalog acquisitions, that does not mean other publishers would not or do not have documents relating to their own acquisition of catalogs."). Amazon and Spotify contend that although they are entitled to a search of all publishers whose executives sit on NMPA's Board of Directors, in the interests of compromise they have agreed to accept searches from Sony, UMPG, Warner Chappell, peermusic, Kobalt, and BMG with respect to U.S. market-related discovery. Motion at 12, n.8.

In its Opposition, Copyright Owners argue that Requests 79, 86 and 87 try to generalize from a single publisher to seek documents from many publishers. Opposition at 6.

### Ruling

After reviewing the parties' arguments, the Judges find that the documents that the Services seek with respect to Sony, UMPG, Warner Chappell, peermusic, Kobalt, and BMG are directly related to Copyright Owners' WRS and therefore are properly discoverable. The Judges **GRANT** the Services' request to compel Copyright Owners to search the files of NMPA board member publishers generally, Copyright Owners must conduct a good-faith search of all responsive documents with respect to each of these publishers and produce all responsive documents, if any, or state affirmatively, with respect to any of the listed publishers, that Copyright Owners found no responsive documents.

### Copyright Owners' Complaint Regarding an Impermissible Number of Interrogatories

In addition to Copyright Owners' objections with respect to particular interrogatories, they also contend that the Services exceed the limit in 37 C.F.R. 351.5(b)(2) for interrogatories by serving multiple-part interrogatories. Opposition at 12. The Services counter that each of their interrogatories with subparts addresses a common topic and identifies additional details concerning that topic. Reply at 9. The Services contend that under Copyright Owners' proposed standard (*i.e.*, simply counting explicit or implicit subparts) Copyright Owners also exceed the 25-interrogatory limit. *Id.*

## Ruling

While the Judges are mindful of the need for parties to comply with the discovery limits in their rules, the rules do not currently limit the number of subparts that an interrogatory may contain. Copyright Owners have not identified a particular interrogatory that they believe seeks information that should have warranted multiple interrogatories. Therefore, the Judges do not believe that Copyright Owners have provided a persuasive argument that the Judges should deny the Motion with respect to any or all of the Services' interrogatories.

Within ten days of the date of issuance of this Restricted Order, the affected parties shall file an agreed redacted version for public viewing.

**SO ORDERED.**

David Shaw  
Digitally signed by David  
Shaw  
Date: 2022.08.01 15:04:41  
+04'00'

---

David P. Shaw  
Chief Copyright Royalty Judge

DATED: August 1, 2022